UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ELLINGTON CREDIT FUND, LTD., *et al.*,

Plaintiffs,

-against-

SELECT PORTFOLIO SERVICING, INC., *et al.*,

Defendants.

08 Civ. 2437 (RJS)

SECOND AMENDED COMPLAINT

1. Plaintiffs Ellington Credit Fund, Ltd. and ECF Special Securities, LLC, respectfully submit this Second Amended Complaint and allege as follows:

I. THE PARTIES, JURISDICTION, AND VENUE

2. Ellington Credit Fund, Ltd. (referred to in this complaint as **ECF**) is a Cayman Islands corporation that is managed by Ellington Management Group, LLC, headquartered in Old Greenwich, Connecticut.

3. ECF Special Securities, LLC (referred to in this complaint as **ECFSS**) is a Delaware limited liability company that is managed by Ellington Management Group, LLC, headquartered in Old Greenwich, Connecticut.

4. Select Portfolio Servicing, Inc. (referred to in this complaint as **Fairbanks**, **Fairbanks/SPS**, or **SPS**) is a Utah corporation. In 2004, Fairbanks Capital Corporation changed its name to Select Portfolio Servicing, Inc.

5. Manufacturers and Traders Trust Company (referred to in this complaint as **M&T**) is a New York corporation organized under the laws of the State of New York.

6. Pursuant to 28 U.S.C. § 1441(a), Defendants removed this case, originally filed in the 345th Judicial District Court in Travis County, Texas.

7. On February 21, 2008, the United States District Court for the Western District of Texas transferred this case to this Court pursuant to 28 U.S.C. § 1404(a).

8. Defendants have each waived any objection to personal jurisdiction.

II. SECURITIZATION OF MORTGAGE LOANS

A. The Way in which Loans are Pooled into Securitization Trusts

9. In the modern U.S. economy, most home mortgage loans are packaged into pools, deposited into securitization trusts, and securitized. In a typical securitization, multiple classes of interests ("Certificates")[1] are created and issued to investors ("Certificateholders" or "Owners"). These securitizations are maintained as trusts held by a trustee. Typically, the interests consist of a series of "senior" Certificates with highest priority of payment, a series of "mezzanine" Certificates with secondary priority, and a series of "junior" or "subordinated" Certificates with the lowest priority of payment. Among the subordinated Certificates, there is typically an "economic residual" or "first loss tranche" that, as the Certificate with the lowest priority of all Certificates of the securitization, typically absorbs all losses from loan defaults before any other Certificates. Given their primary exposure to the performance of the assets of the securitization trusts, such economic residuals ("Residuals" or "Class R Certificates") are also sometimes referred to as representing the "economic equity" of the securitization trusts. Residuals also generally bear the brunt of any extraordinary losses and damages incurred by the securitization trusts, including, in the case of the securitization trusts at issue in this lawsuit, the damages inflicted on such trusts by the Defendants.

10. Securitizations are an important financing vehicle and have become increasingly prevalent after the enactment of provisions of the Internal Revenue Code generally known as the

[1] Unless otherwise defined herein, all capitalized terms shall have the meanings ascribed in the underlying Pooling and Servicing Agreements as hereinafter described.

"REMIC" provisions. *See generally*, 26 U.S.C. § 860A. "REMIC" stands for "Real Estate Mortgage Investment Conduit." The advent of REMICs and other mortgage backed security investment vehicles has stabilized the availability of capital to finance a variety of real estate mortgages since the mid-1980s. Prior to that time, the availability of mortgage funds was highly cyclical, creating periodic stagnation in the U.S. housing market and resulting in negative economic effects. The entire collateralized debt obligation market, and, in turn, the liquidity it provides to the United States housing industry, is dependent upon trustees and servicers (essentially serving at the will of the trustee and handling delegated duties from the trustee) acting in the utmost good faith to the owners, whose money is at risk.

B. The Roles of the Servicer and the Trustee in the Securitization Trusts

11. Securitizations are typically evidenced by a trust agreement usually known as a "Pooling and Servicing Agreement" ("PSA"), the parties to which include a trustee, who agrees to hold the mortgages in trust, and a servicer, who is charged with collecting payments due under the loans, enforcing the terms of the underlying mortgages, and remitting the loan payments and other loan proceeds to the trustee, who then allocates and distributes funds to the various owners. The owners rely upon the trustee's good faith in performance of its duties to the trust for the owners' benefit. The trustee has dominion and control over the trust assets entrusted to its care. The servicer administers the home equity loans which are the principal assets of the trust. The duties of a servicer include not only the actual collection of payments on loans and the monitoring of the collateral, placement of insurance, payment of taxes, etc., but also any foreclosure and collection activities as necessary when a mortgagor defaults. The servicer also is responsible for maintaining properties after foreclosure and marketing foreclosed properties for sale. Servicers perform all of these activities with full knowledge that they are acting on behalf

of, and to maximize the realization by, the owners. Servicers act as delegees of the trustee and owners in this regard.

12. The servicer exercises some of the trustee's discretion as a result of the delegation of some of the trustee's duties to the servicer. The owners rely on the servicer's good faith in performance of its duties to the trust for the owners' benefit. The servicer has dominion and control over trust assets entrusted to its care. Like the trustee, which has delegated its powers and responsibilities to the servicer, the servicer is to exercise any discretion solely for the benefit of the owners.

III. THE RELEVANT SECURITIZATIONS AND PLAINTIFFS' INTERESTS THEREIN

13. Beginning in 1994 and continuing through 1999, ContiFinancial Corporation, ContiWest Corporation, and their affiliates and subsidiaries (collectively "Conti"), sponsored the following twenty-one securitization trusts at issue in this lawsuit (the "Securitizations" or the "Trusts"):

ContiMortgage Home Equity Loan Trust 1994-5

ContiMortgage Home Equity Loan Trust 1995-1

ContiMortgage Home Equity Loan Trust 1995-2

ContiMortgage Home Equity Loan Trust 1995-3

ContiMortgage Home Equity Loan Trust 1995-4

ContiMortgage Home Equity Loan Trust 1996-1

ContiMortgage Home Equity Loan Trust 1996-2

ContiMortgage Home Equity Loan Trust 1996-3

ContiMortgage Home Equity Loan Trust 1996-4

ContiMortgage Home Equity Loan Trust 1997-1

ContiMortgage Home Equity Loan Trust 1997-2

ContiMortgage Home Equity Loan Trust 1997-3

ContiMortgage Home Equity Loan Trust 1997-4

ContiMortgage Home Equity Loan Trust 1997-5

ContiMortgage Home Equity Loan Trust 1998-1

ContiMortgage Home Equity Loan Trust 1998-2

ContiMortgage Home Equity Loan Trust 1998-3

ContiMortgage Home Equity Loan Trust 1998-4

ContiMortgage Home Equity Loan Trust 1999-1

ContiMortgage Home Equity Loan Trust 1999-2

ContiMortgage Home Equity Loan Trust 1999-3

14. Plaintiffs purchased Class M2F Certificates in the 1997-3 Securitization on May 31, 2002, January 29, 2004, and December 6, 2004. Plaintiffs retained these Certificates until the termination of the 1997-3 Securitization.

15. Plaintiffs purchased Class B Certificates in the 1998-2 Securitization on August 10, 2004, and September 21, 2004. Plaintiffs retained these Certificates until the termination of the 1998-2 Securitization.

16. Plaintiffs purchased Class B Certificates in the 1998-3 Securitization on August 10, 2004, August 25, 2004, and December 6, 2004. Plaintiffs retained these Certificates until the termination of the 1998-3 Securitization.[2]

17. By Agreement dated November 12, 2004, Plaintiffs also purchased Class R Certificates in the 1998-2 and 1998-3 Securitizations from Conti. Pursuant to the Assignment

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[2] Plaintiffs also purchased a Class B Certificate in the 1998-3 Securitization on January 6, 2003, and sold it on June 11, 2003.

and Cross Receipt executed in connection with the Agreement, Plaintiffs acquired "[f]or good and valuable consideration…[Conti's] rights, title, and interest in the Trusts as evidenced by the Class R Certificates…."

18. Holders of the Class R Certificates are granted the right pursuant to the PSA in certain circumstances to "call" the related Securitization and terminate the corresponding Trust (a "**Clean-Up Call**").

19. The following three Securitizations (referred to in this complaint as the **Called Securitizations**) have been terminated as a result of the exercise of the "Clean-Up Calls":

ContiMortgage Home Equity Loan Trust 1997-3

ContiMortgage Home Equity Loan Trust 1998-2

ContiMortgage Home Equity Loan Trust 1998-3

20. As holders of the Class R Certificates, Plaintiffs exercised their Clean-Up Call rights and terminated the 1998-2 and 1998-3 Securitizations on February 15, 2005.

21. A third Clean-Up Call, related to the 1997-3 Securitization, was completed on October 17, 2005. For purposes of the 1997-3 Clean-Up Call, Plaintiffs directed Conti to terminate the 1997-3 Securitization.

22. Pursuant to PSA § 9.02 governing Clean-Up Calls, Plaintiffs acquired all of the assets remaining in the Called Securitization at the time each Called Securitization was terminated.

23. In the case of the other eighteen Securitizations (referred to in this complaint as the **Uncalled Securitizations**), Plaintiffs purchased and currently hold interests both in the Class R Certificates of each such Securitization as well as in other Certificates of several higher tranches of such Securitizations.

IV. THE POOLING AND SERVICING AGREEMENTS

24. Each Securitization was established by the execution of, and is governed by, a separate PSA. For ease of reference, citations to a PSA hereunder are to the PSA created for ContiMortgage Home Equity Loan Trust 1998-2, although the provisions of each PSA of the Securitizations are substantially similar.

25. The PSA's covenants and agreements are binding upon any successors and assigns, "whether so expressed or not." (PSA § 11.07). The PSA further directs that any Certificateholder is a beneficiary of the PSA. (PSA § 11.09).

A. The Trustee's Duties Under the PSAs

26. Each PSA imposes specific duties on the Trustee. The "Conveyance" Section of the PSA makes clear that the sole purpose of the Trustee's exercise of power is to benefit the Owners:

> The Trustee . . . accepts the Trust hereunder in accordance with the provisions hereof and agrees to perform the duties herein to the best of its ability **to the end that the interests of the Owners may be adequately and effectively protected.**

(emphasis added).

27. The PSA further provides that **"[t]he Trustee will hold the Trust Estate in trust for the benefit of the Owners** . . . ." (PSA § 6.03(a)) (emphasis added).

28. Further, each PSA states "[t]he Trustee shall have the power to enforce, **and shall enforce** the obligations and rights of the other parties to this Agreement." (PSA § 6.03(b)) (emphasis added). Section 6.04 states, in relevant part:

> The Trustee will not take any action that would release any Person from any of such Person's covenants or obligations under any instrument or document relating to the Certificates or which would ... impair the validity or effectiveness of, any such instrument or document....

29. Section 6.05 states, in relevant part:

> Trustee will not permit the Trust to…
>
> (ii) ... make any deduction from the distributions payable in respect of, the Certificates
>
> . . .
>
> (v)(A) permit the validity or effectiveness of this Agreement to be impaired, or permit any Person to be released from any covenants or obligations with respect to the Trust . . . .

30. The PSA also requires the Trustee to "**give notice to the Owners** … of the occurrence of any event described in paragraphs (a)…[of Section § 8.20] of which the Trustee is aware." (PSA § 8.20(m)) (emphasis added). Such events include, *inter alia*, the Servicer's "fail[ure] to perform any one or more of its obligations" under the PSA (PSA § 8.20(a)(iii)).

B. The Servicer's Duties and Representations Under the PSA

31. Under the PSA, the Servicer agreed to "make reasonable efforts to collect all payments called for under the terms and provisions of the Home Equity Loans" and to "follow collection procedures for all Home Equity Loans at least as rigorous as those described in the FannieMae Guide." (PSA § 8.02).

32. The PSA prohibited the Servicer from allowing any modification, waiver, or amendment of any provision of any loan in a Securitization (a "Subject Loan"), unless it was, in the good faith determination of the Servicer, necessary to minimize a loss. (PSA § 8.13(c)). The Servicer was further obligated to comply with related offering documents.

33. In addition to Section 8.02, the PSA contains several admonitions that the Servicer was to follow Fannie Mae's Servicing Guide (the "Fannie Mae Guidelines"):

> [T]he Servicer shall service and administer the [Subject Loans] in accordance with this Agreement and the servicing standards set forth in the FannieMae Guide….It is the intent of the parties hereto that the Servicer shall have all of the servicing obligations hereunder which a lender would have under the FannieMae Guide.

(PSA § 8.01). These Fannie Mae Guidelines called for, among other things, reports to be made to credit bureaus regarding the payment histories of borrowers. The Fannie Mae Guidelines also allowed the Servicer to be reimbursed out of loan repayments and collateral liquidation only for payments to legitimate third-party vendors. Fannie Mae Guidelines, 108.03 (Part VIII).

34. Further, in connection with foreclosure, the Fannie Mae Guidelines require the Servicer, among other things, to move promptly to foreclose after default; to make every effort to reduce foreclosure-related costs and expenses; to cooperate in the pursuit of deficiency balances; to conduct property maintenance; and notify credit bureaus of foreclosures on a monthly basis. Fannie Mae Guidelines (Part VIII).

35. In addition, upon foreclosure of any Subject Loan, the Servicer is held to a "prudent mortgage lender" standard. (PSA § 8.13(a)).

C. The Transfer of the Servicing Rights to Fairbanks

36. At the inception of each Securitization, Conti was the Servicer of the Subject Loans. However, Conti filed for bankruptcy protection in May 2000, and, on May 17, 2000, its servicing rights and obligations under the PSA were transferred by the Conti bankruptcy estate to Fairbanks pursuant to the terms of an asset purchase agreement of even date (the "Asset Purchase Agreement"), under which Fairbanks agreed to fulfill the duties of the Servicer of the Securitizations, including the duties found in the PSA:

> FCC [Fairbanks] agrees to perform the servicing under the Loan Servicing Agreements assumed by FCC in material conformity with the Loan Servicing Agreements and accepted and prudent servicing practices in the industry for the same type of assets as the mortgage loans subject to such Loan Servicing Agreements and, in a manner consistent with the servicing FCC provides or would provide for assets that FCC owns or in which FCC has an interest. (Asset Purchase Agreement § 6.4).

V. FAIRBANKS/SPS'S MISCONDUCT AND BREACHES OF THE PSA

A. Routine Misconduct by Fairbanks/SPS

37. Fairbanks was not content to make an honest profit from servicing the Subject Loans. Instead, Fairbanks undertook a systematic campaign to boost its profit by dishonest and illegal practices.

38. Fairbanks routinely engaged in predatory servicing, including systematically manufacturing defaults by the borrowers. By manufacturing defaults, Fairbanks was able to charge the borrowers late fees, property inspection fees, unnecessary force-placed insurance, legal fees, and other fees. Despite the fact that these fees were either (i) charged directly to the borrowers or the Trusts or (ii) advanced by Fairbanks (in the form of "Servicing Advances") and ultimately recoverable by Fairbanks from the borrowers or the Trusts, these fees were often either not actually incurred by Fairbanks, not necessary, or, in many instances, funneled to Fairbanks's dummy subsidiaries.

39. These practices allowed Fairbanks to earn an improper windfall in several ways. First, to the extent that Fairbanks collected late fees and other fees from borrowers, Fairbanks could keep them as part of its servicing compensation, setting up a conflict between its obligations to the Owners and its own self-interest. (PSA § 8.15). Second, to the extent that Fairbanks made Servicing Advances, Fairbanks was allowed to be reimbursed from "Monthly Excess Cashflow," before and at the expense of the Class R Certificateholders. (PSA§7.03(e)(iii)).

40. Fairbanks was also allowed to be reimbursed for Servicing Advances from the liquidation proceeds of a particular Subject Loan. As a result, if a borrower had equity in a

property, Fairbanks was far more likely to keep that property in a constant state of default so as to maximize its ability to generate improper fees and Servicing Advances.

41. When Fairbanks/SPS, acting in the name of M&T, closed the sale of Trust-owned real estate through a "HUD1," it impliedly and expressly represented that the charges stated therein were true, correct, and reasonable, to the best of its knowledge. In fact, they were not and it knew that the statements were false.

42. Fairbanks/SPS's routine overstatement and fabrication of servicing expenses, fees, and Servicing Advances resulted in inflated and unnecessary losses to the Trusts and the Certificateholders associated with liquidated loans, including reduction of the net liquidation proceeds payable to the Certificateholders. These losses were further amplified by Fairbanks/SPS's failure to preserve and collect Deficiency Balances – that is, balances that remain unpaid on defaulted loans following foreclosure.

43. Thus, through a scheme of bogus fees and Servicing Advances, Fairbanks was able to receive substantial profit at the expense of the Class R Certificateholders – the legal beneficiaries of the Trusts. In addition, defaulted loans are not worth nearly as much as performing loans, resulting in damage to the Owners and the Trusts.

44. The following is a partial list of front companies established by Fairbanks to profit from its illegal practices:

a. Mountain West Realty Corp.;

b. Pelatis Insurance Agency Corp.;

c. Residential Real Estate Review, Inc.; and

d. Alta Real Estate Services, Inc.

45. These Fairbanks front companies performed no actual services that can be verified or valued. Each of these companies is based at the Fairbanks/SPS offices in Salt Lake City. Alta, Mountain West, and Pelatis exist to skim additional profits.

46. Fairbanks/SPS also violated its obligations under the PSA by entering fraudulent listing agreements. Through Mountain West, Fairbanks/SPS required real estate brokers and listing agents to sign an agreement to kick back part of their REO sales commission to Mountain West, which did nothing in connection with the sale.

47. By entering into the listing agreements, Fairbanks/SPS falsely represented to the Trust that the amount of the commission was independently negotiated, and not affected in any way by any third party. Fairbanks/SPS thus engaged in a subterfuge to deplete realized proceeds from liquidation of Trust property to the detriment of the Owners and the Trusts.

48. In connection with the taking of the real estate commissions on REO sales, Fairbanks originally demanded and received 25% of the seller's real estate brokerage commissions as a "referral fee," in some instances, directing that the 25% referral fee be paid to Mountain West instead of Fairbanks/SPS. If Fairbanks/SPS had been acting in accordance with the PSA and in the best interests of the Securitization, any such fees should have been redeposited into the Securitizations as recovered expenses.

49. Later, in December 2002, Fairbanks changed its procedures, and indicated to listing agents that it had a contract with Mountain West whereby Mountain West was entitled to a kickback on the real estate brokerage commission on each sale. Fairbanks/SPS directed that each listing agent sign an agreement between the listing agent and Mountain West stating that such listing agent would pay 25% (for sales under $60,000) and 31% (for sales $60,000 and above) of its listing commission to Mountain West, a Utah real estate entity that had nothing to

do with the real estate sale, other than it was set up as a conduit for Fairbanks/SPS to extract money from the sales rather than negotiating the best terms on behalf of the Securitizations they were engaged to represent. In some cases, Fairbanks negotiated a minimum commission of $2,000 for itself and the selling broker to share. These commission agreements disincentivized brokers from trying to sell modest properties for more than $60,000 even where tax appraisals valued them at nearly twice that number.[3] These below-market sales of foreclosed properties greatly exacerbated the losses to the Owners and the Trusts.[4]

50. Moreover, one of the provisions of the PSA is the requirement that the Servicer place insurance on properties that are in the Securitization if the homeowners fail to do so. (PSA § 8.11). This insurance is called "lender-placed" or "force-placed" insurance and can be two to three times the cost of traditional homeowners' policies. Fairbanks often ignored letters from borrowers enclosing proof of insurance as a mechanism to keep borrowers in a state of perpetual default.

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[3] A $60,000 purchase price would generate a seller's commission of the greater of $2,000 or 3% ($1,800). Applying a referral fee of 25%, the net broker's commission would leave $1,500 for the selling broker. Because the referral fee increases to 31% at $60,000, a purchase price of $80,000 would generate a commission of 3% ($2,400), but 31% or $744 would be kicked back to Mountain West, leaving a net commission to the agent of $1,656 – a nine percent increase in fee for a 25% increase in price. For an agent to realize more than $2,000 after the "referral fee," it was necessary to exceed a purchase price of $100,000 to make $2,070. Most of the REO properties in the $70,000 to $120,000 appraisal range sold for at or near $60,000.

[4] For example, Fairbanks took the following unauthorized payments as kickbacks of unearned real estate commissions on the following loans in the amounts indicated: Pflugerville, Texas, $982.54 on September 2, 2004; Emory, Texas, $594.27 on March 26, 2004; Port Arthur, Texas, $312.50 on February 25, 2004; Garland, Texas, $1,475.00 on April 22, 2003; Houston, Texas, $ 1,257.30 on January 26, 2004; Hooks, Texas, $250.00 on December 31, 2002; Fort Worth, Texas, $312.50 on April 30, 2004; Malakoff, Texas, $250.00 on September 17, 2002; Houston, Texas, $1,121.25 on June 30, 2004; Austin, Texas, $ 1,720.40 on October 3, 2003; Sugarland, Texas, amount unknown on October 31, 2001; and Fort Worth, Texas, $805.98 on September 2, 2003. These loans are merely representative of other loans too numerous to list here. The defalcations represented by the real estate commission scam are each individually small, but pervasive, and collectively amounted to millions of dollars in damages to the Securitizations.

51. To profit from this practice, Fairbanks required that the insurance companies or brokers who actually placed such over-priced insurance on the properties pay a share of their commissions to Pelatis Insurance Agency, a front company that Fairbanks established to collect such commissions in each state where it serviced mortgages.

52. Fairbanks/SPS disguised the force-placed insurance payments as escrow advances. After a property was sold, Fairbanks/SPS made a base liquidation report[5] to the Trustee and provided information concerning the legitimacy of Servicing Advances. Fairbanks/SPS did not display, in the indicated place on the base liquidation report it provided for the Certificateholders' benefit, the amounts paid as insurance kickbacks. Instead, Fairbanks/SPS buried the insurance payments in the "escrow advance" line in the base liquidation report, along with other ordinary and proper expenses. At the time of the liquidation of any loan, Fairbanks/SPS reimbursed itself for the kickbacks it had earlier directed to itself (through the insurance agency front company it had set up and controlled) out of funds that should have gone to the Owners.[6]

53. When Fairbanks/SPS issued base liquidation reports to the Trustee, it impliedly and expressly represented that the charges stated therein were true, correct, reasonable, and recoverable under the PSA, to the best of its knowledge. In fact, they were not and the statements were known to be false.

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[5] A base liquidation report provides a single page summary of relevant financial information regarding each loan at the time of the sale of the property securing the loan.

[6] Fairbanks, through Pelatis, took unauthorized and excessive payments of insurance commissions on the following loans: Pflugerville, Texas, on September 2,2004; Emory, Texas, on March 26,2004; Port Arthur, Texas, on February 25,2004; Garland, Texas, on April 22,2003; Houston, Texas, on January 26,2004; Hooks, Texas, on December 31,2002; Fort Worth, Texas, on April 30,2004; Malakoff, Texas, on September 17,2002; Houston, Texas, on June 30,2004; and Sugarland, Texas, on October 31,2001. These loans are merely representative of other loans in Texas and elsewhere too numerous to list here.

54. These liquidation reports were false, because they misrepresented that the Servicing Advances were for services actually rendered in conformance with the Fannie Mae Guidelines, the industry norms, and the PSA, when in fact they were not.

55. Neither Mountain West nor Pelatis rendered any actual services to the Securitizations for the payments that they received. They existed solely to skim additional, improper income out of Trust property.

56. Furthermore, Fairbanks/SPS failed to preserve millions of dollars in Deficiency Balances on defaulted loans. Fairbanks/SPS improperly released or otherwise bargained away those balances to avoid further predatory servicing litigation, discussed below. For example, Fairbanks/SPS failed to report borrowers as past due and owing money after foreclosure. In addition, Fairbanks/SPS issued Internal Revenue Service forms 1099 and 1098 to borrowers after foreclosure showing they owed nothing by way of deficiency.[7] As a result, Deficiency Balances that could otherwise be collected and distributed to the Trust and the Certificateholders were never preserved by Fairbanks/SPS. Plaintiffs discovered that Fairbanks/SPS failed to preserve the Deficiency Balances when Plaintiffs assigned the collection of those Deficiency Balances away from Fairbanks/SPS to TMI Financial.

57. Fairbanks/SPS followed neither standard industry practices of a prudent mortgage lender nor the Fannie Mae Guidelines in their servicing efforts, as required by the PSA. Fairbanks/SPS failed to follow accepted servicing standards by, among other things, failing to undertake "skip tracing" efforts to find borrowers who had relocated and promptly move to foreclose after default by the borrowers.

[7] The zero-balance 1099's and 1098's had the effect of giving borrowers a document by which they could contest a Deficiency Balance and were demonstrably at odds with both the base liquidation reports given to the Trustee and the reports given to investors such as Plaintiffs regarding the assets in the Securitizations.

58. Moreover, once a loan is in default, prudent servicing practices dictate that the Servicer conduct periodic property inspections, and, in connection with assessing an appropriate foreclosure and sale value, get an informal valuation from a real estate broker, known as a "broker price opinion." A review of the Servicing Advances paid to the front companies demonstrates that Fairbanks ordered an excessive number of broker price opinions and inspections on the defaulted loans in the Securitizations. Thus, in addition to paying itself for these fees through its front companies, Fairbanks paid itself for more frequent broker price opinions and property inspections than necessary to properly service the loans.

59. Fairbanks took unauthorized payments for over-priced and overly-frequent property inspections and broker price opinions through its subsidiaries Residential Real Estate Review, Inc. and Alta Real Estate Services, Inc.[8]

60. Fairbanks/SPS also demanded in many instances that listing agents kick back to Fairbanks/SPS all fees paid to the listing agent for broker price opinions.

61. As set forth above, the PSA provides that Fairbanks/SPS could reimburse itself from property proceeds only as was prudent and customary in the mortgage servicing business and in conformity with Fannie Mae Guidelines. The Fannie Mae Guidelines only allowed reimbursement for payments made to third parties, not to its own dummy subsidiaries, and only for limited, legitimate expenses.

[8] For example, Fairbanks took unauthorized payments through Residential Real Estate for over-priced and overly-frequent property inspections and broker price opinions on the following Texas properties: Port Arthur, Texas; Houston, Texas; Tyler, Texas; Wichita Falls, Texas; Arlington, Texas; Nederland, Texas; Garland, Texas; Emory, Texas; Hooks, Texas; Fort Worth, Texas; Malakoff, Texas; Houston, Texas; Houston, Texas; Pflugerville, Texas; Austin, Texas; Fort Worth, Texas; Houston, Texas; and Sugarland, Texas.

As another example, Fairbanks took unauthorized payments through Alta for over-priced and overly-frequent property inspections and broker price opinions on the following Texas properties: Port Arthur, Texas; Wichita Falls, Texas; Nederland, Texas; Emory, Texas; Hooks, Texas; Fort Worth, Texas; Pflugerville, Texas; Austin, Texas; and Houston, Texas.

62. The payments made to Residential Real Estate and Alta for property inspections and broker price opinions were not made to true third parties and were for bogus charges. For this reason, Fairbanks/SPS went to elaborate lengths to disguise the true nature of the entities it owned and controlled and to which it directed that payments be made.

63. Further, Fairbanks/SPS also tried to outsource as many of its core servicing responsibilities as possible to third party vendors. For example, Fairbanks/SPS hired groups including a private company named Loan Protector General Agency, Inc., based in Ohio, to monitor the status of insurance on properties where the property owner had defaulted on payments. The amounts paid to Loan Protector General Agency, Inc. were improperly charged by Fairbanks/SPS as Servicing Advances, even though the function performed was a responsibility of the Servicer, and was to be covered by the base fee received by the Servicer. These Servicing Advances for core servicing functions had the effect of decreasing the amounts received by the Owners, while increasing the amount of profit made by Fairbanks/SPS. On information and belief, Fairbanks/SPS also classified as Servicing Advances amounts it paid others, such as Lereta Corp., Residential Real Estate Review, and Alta, for core servicing functions for which no additional compensation is owed.

B. Fairbanks's Settlement of the Class Action and FTC Claim

64. In the fall of 2002, the Federal Trade Commission ("FTC") started an investigation of Fairbanks's predatory servicing tactics, including those described above. Borrowers filed several class actions against Fairbanks related to Fairbanks's failure to post payments, not accepting partial payments, improperly imposing force-placed insurance, and placing borrowers in default based on manufactured circumstances. In April of 2003, Fairbanks consolidated the class action lawsuits in the Federal District Court for the District of

Massachusetts under the case titled, *Curry v. Fairbanks Capital Corporation*, Case No. 03-10895-DPW (hereinafter, "*Curry*").

65. At the same time that it was attempting to limit its financial exposure for its wrongdoing with the *Curry* class action lawyers, Fairbanks negotiated with the FTC to avoid civil penalties associated with its violations of the Federal Debt Collection Practices Act and the Fair Credit Reporting Act. On November 12, 2003, Fairbanks agreed to a consent judgment with the FTC that was then memorialized in the same court as the *Curry* case in Case No. 03-12219-DPW (hereinafter *"FTC"*). On November 14, 2003, the *Curry* class action settlement was finalized along with the *FTC* Consent Decree.

66. Fairbanks settled both the *FTC* and *Curry* lawsuits, in part, by voluntarily agreeing to curtail and hamstring certain of its collection practices. To extricate itself from the trap created by its own predatory servicing practices, Fairbanks agreed to change not only its dishonest and illegal collection practices, but also to forego honest, legal and prudent collection practices that were required by the PSA and necessary to the maximization of the recoveries to the Securitizations.

67. For instance, Fairbanks agreed to forego referring loans to foreclosure until at least 92 days after default by the applicable borrower. *See* Default Resolution Program, app. 1, § III.C.l to the *Curry* settlement. Applicable Fannie Mae Guidelines instructed Fairbanks to initiate foreclosure after 60 days' delinquency. (Fannie Mae Guidelines, part VIII, § 102). By agreeing to 92 days after default, Fairbanks agreed to a lesser standard that caused significant deterioration in the collateral for the Securitizations and significantly decreased the expected recoveries on defaulted loans.

68. Fairbanks also improperly agreed to refrain from reporting loans as past due to credit bureaus in any instance where a borrower indicated it had a dispute. (*Curry* Consent Decree ¶ E.) At the expense of the Securitizations, Fairbanks ceased activities even beyond these restrictions (to which it was not free to agree) by simply ceasing to report any borrowers as delinquent or past due. This practice of not reporting to the appropriate credit bureaus also ultimately jeopardized and diminished the ability to preserve and protect the Deficiency Balances.

69. Reporting delinquent borrowers to credit bureaus significantly increases collections on a mortgage loan portfolio, particularly for Deficiency Balances. Fairbanks's failure to submit any such reports significantly diminished collections and seriously degraded the value of the Securitizations at the expense of the Owners, including Plaintiffs. Thus, the *FTC* and *Curry* settlement provisions resulted in Fairbanks, by agreement or by over-inclusion, servicing the Subject Loans in a manner inconsistent with the PSA, the Fannie Mae Guidelines, and applicable "prudent mortgage lender" standards.

70. As part of the *Curry* settlement process, Fairbanks indicated that it would have been rendered insolvent if it had lost the pending class action cases. (Fairbanks's Submission Concerning Settlement, pp. 6 and 9). Another submission, the affidavit of Thomas Hefferon, indicated that the investigations and claims brought against Fairbanks beginning in late 2002, "exposed the company to substantial risk." (Hefferon Affidavit, ¶ 6).

71. In July of 2004, to escape the unflattering publicity, Fairbanks Capital Corporation changed its name to Select Portfolio Servicing, Inc. ("SPS").

VI. M&T'S KNOWLEDGE OF FAIRBANKS'S MISCONDUCT

72. M&T knew of Fairbanks/SPS's misconduct, but never notified the Owners thereof.

73. M&T knew of Fairbanks/SPS's predatory servicing practices detailed in the *Curry* and *FTC* actions and knew that such practices would cause damage to the Securitizations and their Owners. M&T never notified the Owners of Fairbanks/SPS's predatory servicing practices despite its obligation under the PSA to do so.

74. M&T also knew of Fairbanks/SPS's deteriorating servicing capabilities as evidenced by the servicing downgrades. However, M&T again did not notify the Owners despite its obligation under the PSA to do so. M&T merely engineered a release for itself from the class action plaintiffs that it used to avoid its own liability for its failure to detect and curtail Fairbanks's predatory practices. *See, e.g., Medina v. Manufacturers & Traders Trust Co.,* No. 04 C 2175 2004 U.S. Dist. LEXIS (N.D. Ill, Dec. 9, 2004) (dismissing predatory servicing lawsuit against M&T based on release of M&T in *Curry*).

75. Substantial servicers such as Fairbanks are monitored by the largest credit rating agencies, namely S&P, Fitch, and Moody's. The "Servicer Ratings" and other reports issued by these rating agencies are followed not only by the investment community, but also by trustees (such as M&T) in the course of their providing services to various securitizations.

76. In the second quarter of 2003, Fairbanks's servicer ratings were downgraded by S&P and Moody's to "below average." At the same time, Fitch downgraded Fairbanks to "average." These downgrades, as noted by the sworn deposition testimony of Fairbanks's Matthew Hollingsworth on March 31, 2004 (the "Hollingsworth Deposition"), meant that Fairbanks could not acquire new portfolios to service because the marketplace does not accept a "below average" servicer. Fairbanks, as Mr. Hollingsworth admitted, went into a downward economic spiral. (Hollingsworth Deposition, pp. 10-13).

77. On May 1, 2003, Moody's issued a report on Fairbanks. The report, a copy of which was, or should have been, received and reviewed by M&T, stated:

> Moody's, however, questions whether Fairbanks will be able to sustain these servicing results in the future *given the potential liquidity pressures facing the company and the changes that Fairbanks has recently implemented to its servicing procedures to address regulatory and customer service issues...*
>
> *In addition, the new policies and procedures that management implemented to address processing and regulatory issues, while positive from a customer service and regulatory standpoint, could nevertheless increase resolution timelines and ultimate loss severities.*

(emphasis added).

78. At least as of May 2003, the Moody's report conclusively shows M&T knew that Fairbanks had agreed to compromise its ability to properly collect loans. (In fact, if they were doing even part of what they promised to monitor the Servicer, they knew much earlier that Fairbanks was not doing its job, and was pilfering funds.) Rather than to notify the Owners of Fairbanks' compromised ability and downgrades, M&T did nothing.

79. As was anticipated by Moody's, the *Curry* settlement severely compromised Fairbanks's ability to collect on the Subject Loans. Collection rates plummeted as Fairbanks quit meaningful efforts to collect on defaulted loans to avoid further liability to borrowers. Fairbanks even quit attempting to collect debts with lawful and ordinary means, such as reporting adverse information to the credit bureaus on defaulted loans, as mandated by the Fannie Mae Guidelines and the PSA. The failure to report adverse information to the credit bureaus further jeopardized the ability to collect Deficiency Balances because many states require such reporting as a pre-condition to enforcing the deficiency against the borrowers. Not surprisingly, many borrowers had little, if any, incentive to pay the amounts they owed to the Securitizations.

80. The *Curry* Settlement and the *FTC* Consent Decree were red flags to M&T that Fairbanks had been and was improperly augmenting its servicing income and not complying with the Fannie Mae Guidelines and "prudent mortgage lenders" standards set forth throughout the PSA.

81. M&T was under a duty, pursuant to Section 8.20 (m) of the PSA, to promptly report the servicing defaults to the Certificateholders. It failed to do so.

82. In addition, monthly reports were provided to the Trustee, which allowed M&T to learn of Fairbanks/SPS's misconduct. Despite access to the monthly reports, M&T failed to notify the Owners of Fairbanks/SPS's wrongdoing.

83. Fairbanks/SPS's failures to follow accepted servicing standards, as detailed above, were caused, in part, by Fairbanks's predatory servicing practices that created improper and often uncollectible fees. Fairbanks's failures were further compounded by the restrictions in the *Curry* and *FTC* settlements on its ability to properly service mortgages on behalf of the Certificateholders. M&T failed to notify Plaintiffs of Fairbanks's misconduct even though Fairbanks's failure to follow accepted servicing standards and comply with its obligations under the PSA were well known to M&T. As a result, Plaintiffs' interests were severely damaged.

VII. FRAUD BY SPS IN CONNECTION WITH THE CLEAN-UP CALLS

84. Pursuant to Section 9.02 of the PSA, a majority holder of Class R Certificates may exercise its Clean-Up Call right and terminate the corresponding Trust. To do so, the holder of the Class R Certificate must deposit into the Trust all outstanding amounts owed to the other Certificateholders, as well as any amounts that are owed to the Servicer for "trapped" (*i.e.,* unreimbursed) Servicing Advances, whereupon any remaining assets in the Trust are transferred to the Class R Certificateholder. After the remaining loans are released from the Trust to the Class R Certificateholder after the exercise of such a Clean-Up Call, the Class R

Certificateholder would then control the servicing of such loans, including the right to re-assign such servicing to another loan servicer.

85. In considering whether to exercise the Clean-Up Calls on 1997-3, 1998-2, and 1998-3 Securitizations, Plaintiffs made several inquiries of SPS regarding the amounts of Servicing Advances that Plaintiffs would be required to reimburse SPS upon the exercise of the Clean-Up Calls.

86. On December 23, 2004, Mitchell Levine, then Director of Loan Acquisition at Ellington Management Group, LLC exchanged a series of emails with Cameron Boice, Business Development at SPS and Frank Raposo, Vice President, Investor Reporting at SPS, regarding, among other things, the amount of outstanding Servicing Advances for the 1998-2 Securitization. In an email dated December 23, 2004, Mr. Raposo sent to Mr. Levine an excel spreadsheet titled "1998-2 Advances to be recovered." In the cover email, Mr. Raposo wrote: "Attached you will [sic] the advances due SPS." The spreadsheet contained the following information under the heading "Servicer Advance Detail":

Escrow Advances on Charged Off Assets	(925,255.78)
Recoverable Corporate Advances on Charged off Assets	(618,270.01)
Third Party Advances on Charged off Assets	(724,793.16)
Escrow Advances on Active Assets	(3,432,069.17)
Recoverable Corporate Advances on Active Assets	(1,266,182.34)
Third Party Advances on Active Assets	(265,336.08)
Trapped Advances while serviced at Conti	(121,145.09)
Conti Loss Severity Fundings	(129,129.64)

Total Servicer Advances	**(7,482,181.27)**
Grand Total Due SPS as of 12/01/04	**$(11,496,863.34)**
Grand Total Due SPS as of 12/01/04 Including the Scheduled Interest Already Remitted 12/10/04	**$(12,919,933.17)**

87. On January 5, 2005, Mr. Levine exchanged a series of emails with Mr. Raposo. Mr. Levine asked Mr. Raposo to "send me advance information as well as charge off bank information for conti 98-3 and 97-3." In response, also on January 5, 2005, Mr. Raposo sent Mr. Levine two Excel spreadsheets. In the cover email, Mr. Raposo wrote: "Attached is the information you requested." The spreadsheet titled "1998-3 Advances to be recovered 123104" contained the following information under the heading "Servicer Advance Detail":

Escrow Advances on Charged Off Assets	(1,359,562.05)
Recoverable Corporate Advances on Charged off Assets	(1,125,715.46)
Third Party Advances on Charged off Assets	(826,899.67)
Escrow Advances on Trust Reported loans	(5,020,514.52)
Recoverable Corporate Advances on Trust Reported loans	(1,739,371.33)
Third Party Advances on Trust Reported loans	(433,813.90)
Trapped Advances while serviced at Conti	(33,219.65)
Conti Loss Severity Fundings	(208,691.10)
Total Servicer Advances	**(10,747,787.68)**
Grand Total Due SPS as of 01/01/05	**(16,607,478.63)**

Grand Total Due SPS as of 01/01/05 Including the Scheduled Interest Already Remitted 01/10/05	**(18,605,693.31)**

88. The spreadsheet titled "1997-3 Advances to be recovered 123104" contained the following information under the heading "Servicer Advance Detail":

Escrow Advances on Charged Off Assets	(580,626.93)
Recoverable Corporate Advances on Charged off Assets	(388,857.88)
Third Party Advances on Charged off Assets	(565,690.89)
Escrow Advances on Trust Reported loans	(2,028,712.16)
Recoverable Corporate Advances on Trust Reported loans	(626,525.50)
Third Party Advances on Trust Reported loans	(189,813.82)
Trapped Advances while serviced at Conti	(605,808.88)
Conti Loss Severity Fundings	-
Total Servicer Advances	**(4,986,036.06)**
Grand Total Due SPS as of 01/01/05	**(6,982,513.28)**
Grand Total Due SPS as of 01/01/05 Including the Scheduled Interest Already Remitted 01/10/05	**(7,652,312.06)**

89. The statements and figures provided by SPS to Plaintiffs in the December 23, 2004 and January 5, 2005 emails and spreadsheets regarding Servicing Advances due SPS for the 1997-3, 1998-2, and 1998-3 Securitizations were false, inaccurate, and inflated.

90. Fairbanks/SPS made these advances prior to holding sales of foreclosed real estate on behalf of the Trust. While some of the advances were made legitimately, to the extent these "advances" found their way to Fairbanks/SPS affiliates, Fairbanks/SPS was advancing

funds to itself, and any "reimbursement" for such an "advance" constituted improper double recovery.

91. When the amount realized in the sale satisfied both the debts and the advances, Fairbanks/SPS took money out of the proceeds from the sale of the foreclosed real estate to pay itself again as a "reimbursement" for amounts it had already pilfered through its dummy companies. When the amounts realized from resale cannot satisfy the outstanding principal and interest balance of the loan, together with the advances, the advances are deemed "trapped."

92. In connection with the Clean-Up Calls, Fairbanks/SPS demanded that it be paid by Plaintiffs for certain Servicing Advances for which Fairbanks/SPS was not entitled to be reimbursed. When it was so paid, it essentially paid itself a second time for amounts it had already pilfered through its dummy companies.

93. In addition, some of the advances for which Fairbanks/SPS sought reimbursement were improper because they constituted: (1) advances for work that was never performed; (2) advances that were greater than the amounts actually advanced by Fairbanks/SPS; (3) advances made for work that was not necessary; (4) advances for work that was part of the core servicing function of the master servicer that should have been included in the core servicing fee and not as a separate servicing advance; and (5) advances that Fairbanks/SPS had already recouped through undisclosed kickbacks.

94. When Fairbanks/SPS issued statements to Plaintiffs in connection with the Clean-Up Calls, it impliedly and expressly represented that the all the charges for the Servicing Advances were true, correct, reasonable, and subject to reimbursement under the PSA to the best of its knowledge. In fact, they were not and the statements were known to Fairbanks/SPS to be false.

95. Plaintiffs elected to terminate the Called Securitizations. The 1998-2 and 1998-3 Securitizations were terminated on February 15, 2005. The 1997-3 Securitization was terminated on October 17, 2005.

96. In connection with the exercise of these Clean-Up Calls, Plaintiffs paid over $37 million to SPS in reimbursement for Servicing Advances.

97. In reliance on Fairbanks/SPS's false representations regarding its bogus and inflated Servicing Advances, Plaintiffs were induced by SPS to pay an unsupported and inflated amount to SPS.

98. Further, in reliance on the false reporting by SPS, Plaintiffs elected to retain SPS as the servicer of the loans in the Called Securitizations following the Clean-Up Calls. Plaintiffs entered into new letter agreements with SPS for servicing the loans in each Called Securitization.

99. In connection with the Clean-Up Calls, Plaintiffs acquired the mortgage loans in each Called Securitization. Plaintiffs' subsequent review of the mortgage loan files and servicing records revealed the nature and extent of Fairbanks/SPS's fraudulent conduct. For example, the review revealed that Fairbanks/SPS routinely paid its front companies for unnecessary services, such as overpriced and unduly frequent inspections and broker price opinions, as well as for the performance of core functions for which no additional compensation was owed.

VIII. THE LIMITATION OF SUITS CLAUSE

100. Each PSA has a Limitation of Suits clause with language similar to the following:

Section 6.07 Limitation of Suits.

> No Owner shall have any right to institute any proceeding, judicial or otherwise, with respect to this Agreement, the Insurance Agreement, the Indemnification Agreement or the Certificate Insurance Policies or for the appointment of a receiver or trustee of the Trust, or for any other remedy with respect to an event of default hereunder, unless:
>
> > (1) such Owner has previously given written notice to the Depositor, the Certificate Insurer and the Trustee of such Owner's intention to institute such proceeding;

> (2) the Owners of not less than 25% of the Percentage Interests represented by the Class A Trust Certificates and Class B Certificates then Outstanding or, if there are no Class A or Class B Certificates then Outstanding, by such percentage of the Percentage Interests represented by the Class R Certificates, shall have made written request to the Trustee to institute such proceeding in its own name as Trustee establishing the Trust;
>
> (3) such Owner or Owners have offered to the Trustee reasonable indemnity against the costs, expenses and liabilities to be incurred in compliance with such request;
>
> (4) the Trustee for 60 days after its receipt of such notice, request and offer of indemnity has failed to institute such proceeding;
>
> (5) as long as any Class A Trust Certificates are Outstanding or any Reimbursement Amount remains unpaid, the Certificate Insurer consented in writing thereto (unless the Certificate Insurer is the party against whom the proceeding is directed); and
>
> (6) no direction inconsistent with such written request has been given to the Trustee during such 60-day period by the Owners of a majority of the Percentage Interests represented by the Class A Trust and Class B Certificates or, if there are no Class A Trust or Class B Certificates then Outstanding, by such majority of the Percentage Interests represented by the Class R Certificates;
>
> it being understood and intended that no one or more Owners shall have any right in any manner whatever by virtue of, or by availing themselves of, any provision of this Agreement to affect, disturb or prejudice the rights of any other Owner of the same Class or to obtain or to seek to obtain priority or preference over any other Owner of the same Class or to enforce any right under this Agreement, except in the manner herein provided and for the equal and ratable benefit of all the Owners of the same Class.

101. Section 6.07 does not govern claims against the Defendants relating to the Called Securitizations. By issuing the Clean-Up Calls, Plaintiffs terminated the Securitizations, paid the former certificate holders and assumed ownership of the collateral. Plaintiffs are the only parties who have retained an interest in the assets of the Called Trusts, and the Trustee no longer has any duties or responsibilities to those Trusts. Moreover, the Trustee no longer has standing to litigate claims on behalf of the Called Trusts. Therefore, Plaintiffs are not required to make a demand on the Trustee before filing suit to enforce their rights.

102. With respect to all claims against M&T, including those relating to the Uncalled Securitizations, Ellington is not required to make a demand on the Trustee to bring claims against itself. Therefore, any non-compliance by Plaintiffs with Section 6.07 with respect to claims against M&T is excused.

IX. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Breach of the PSAs that Govern the Called Securitizations (Against Fairbanks/SPS)

103. Plaintiffs repeat paragraphs 1 through 102.

104. Under the PSAs that govern the Called Securitizations, Fairbanks/SPS was obligated to "follow collection procedures for all Home Equity Loans at least as rigorous as those described in the Fannie Mae Guidelines."

105. Fairbanks/SPS breached the PSAs that govern the Called Securitizations by failing to service the loans in accordance with Fannie Mae Guidelines; failing to make reasonable efforts to collect payments; making unreasonable and improper modifications, waivers, and amendments; and failing to exercise the degree of care and skill of a prudent mortgage lender in connection with foreclosures. For example, each of the following was a breach of Fairbanks/SPS's duties under the PSAs:

(a) Fairbanks/SPS failed to preserve the deficiency balances on foreclosed properties.

(b) Fairbanks/SPS paid excessive Servicing Advances to itself and its affiliates.

(c) Fairbanks/SPS and its affiliates took kickbacks from real-estate brokers and insurance brokers.

(d) Fairbanks/SPS and its affiliates collected unauthorized payments for over-priced and overly-frequent property inspections and broker price opinions.

(e) Fairbanks/SPS passed off expenses to third parties that were covered by the core servicing fee as Servicing Advances.

(f) Fairbanks/SPS did not undertake customary rigorous collection efforts, such as locating borrowers who had moved or pursuing deficiency claims against borrowers after foreclosure.

(g) After the *FTC* and *Curry* settlements, Fairbanks/SPS did not report delinquent borrowers to the credit agencies or foreclose on properties within 60 days.

106. Plaintiffs have been damaged by Fairbanks/SPS's breaches of its contractual promises.

SECOND CLAIM FOR RELIEF

Fraud in Connection with the Called Securitizations (Against Fairbanks/SPS)

107. Plaintiffs repeat paragraphs 1 through 106.

108. Fairbanks/SPS misrepresented existing material facts with respect to the amount of Servicing Advances to be reimbursed by Plaintiffs. Fairbanks/SPS, by itself, or through its subsidiaries, improperly inflated the amounts of Servicing Advances for which it was entitled to be reimbursed by Plaintiffs. The improper Servicing Advances for which Fairbanks/SPS sought reimbursement included: (1) advances for work that was never performed; (2) advances that were greater than the amounts actually advanced by Fairbanks/SPS; (3) advances made for work that was not necessary; (4) advances for work that was part of the core servicing function of the master servicer that should have been included in the core servicing fee and not as a separate

servicing advance; and (5) advances that Fairbanks/SPS had already recouped through undisclosed kickbacks.

109. When Plaintiffs exercised their Clean-Up Call rights, they were required to reimburse Fairbanks/SPS for Servicing Advances that had been advanced by Fairbanks/SPS on behalf of the Trust.

110. Fairbanks/SPS falsely represented the amount of advances for which it was entitled to be reimbursed by Plaintiffs. In particular, Fairbanks/SPS impliedly and expressly represented that the advances for which it sought to be reimbursed were for amounts that had been advanced in conformance with the Fannie Mae Guidelines, industry norms, and the PSAs, when in fact they were not.

111. In an email dated December 23, 2004, Frank Raposo, Vice President, Investor Reporting at SPS represented to Mitchell Levine, Director of Loan Acquisition at Ellington Management Group, LLC that SPS was due to be reimbursed $12,919,933.17 in Servicing Advances for the 1998-2 Securitization.

112. In an email dated January 5, 2005, Mr. Raposo represented to Mr. Levine that SPS was due to be reimbursed $7,652,312.06 in Servicing Advances for the 1997-3 Securitization and $18,605,693.31 in Servicing Advances for the 1998-3 Securitization.

113. When Fairbanks/SPS made such misrepresentations, it knew the statements were false and intended for Plaintiffs to act upon them, including by paying to Fairbanks/SPS an unsupported and inflated amount in purported reimbursements and by electing to retain Fairbanks/SPS as servicer of the loans in the Called Securitizations.

114. Furthermore, Fairbanks/SPS's intentional failure to disclose the truth constituted material omissions made by Fairbanks/SPS with the intent that Plaintiffs act upon them.

115. Plaintiffs relied, to their detriment, on these misrepresentations and paid to Fairbanks/SPS $37,066,424.59, as reimbursement for Servicing Advances.

116. As a result of Fairbanks/SPS's fraud, Plaintiffs have incurred damages in an amount to be determined at trial.

THIRD CLAIM FOR RELIEF

Breach of the PSAs that Govern All Securitizations (Against M&T)

117. Plaintiffs repeat paragraphs 1 through 116.

118. Section 8.20(m) of each PSA requires the Trustee to "give notice to the Owners…of the occurrence of any event described in paragraphs [8.20(a)] of which the Trustee is aware. One of the qualifying events under Section 8.20(a)(iii) is the servicer's "fail[ure] to perform any one or more of its obligations hereunder."

119. M&T knew about Fairbanks/SPS's failure to perform its servicing obligations based on, among other things, its knowledge of the *Curry* settlement and its effect on Fairbanks/SPS's servicing practices, and Moody's downgrade of Fairbanks/SPS's servicer rating as "below average."

120. In addition, because Fairbanks/SPS is an agent of M&T for purposes of servicing the Subject Loans, Fairbanks/SPS's knowledge regarding its failure to perform its servicing obligations is imputed to M&T.

121. M&T breached the PSAs by failing to notify the Owners of Fairbanks/SPS's breaches of the PSAs.

122. Plaintiffs and the Trusts have been damaged by M&T's breaches of its contractual duties.

X. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court enter judgment in their favor and against Defendants Select Portfolio Servicing, Inc. and Manufacturers and Traders Trust Company, jointly and severally, for the following:

a. The actual amount of Plaintiffs' damages, to be determined at trial;

b. Punitive damages;

c. Attorneys' fees and all costs of court;

d. Prejudgment interest at the maximum legal rate; and

e. Such other and further relief to which Plaintiffs may be entitled.

Dated: New York, New York
June 6, 2012

GRAIS & ELLSWORTH LLP

By: ______________________

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